JUL 2 2001

FILED
JUL 2 2001
OFFICE OF THE CLERK

No. 00-795

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT,
Attorney General of the United States, *et al.*,
Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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July 2, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*[1] AND INTRODUCTION

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. This case presents the possibility that the federal government will restrict these liberties. Because of The Liberty Project's strong interest in protecting citizens from any government overreaching and in defending the constitutional rights of citizens from efforts to deny them, it is well situated to provide this Court with additional insight into the issues presented in this case.

Amicus does not oppose the application of valid child pornography laws criminalizing the creation and distribution of materials depicting actual children engaging in sexually explicit conduct. *Amicus* has grave concerns, however, about the law at issue in this case, the Child Pornography Prevention Act. In the Act, Congress has untethered child pornography law from its constitutional moorings, taking the unprecedented step of banning sexually explicit, though not necessarily obscene, material that merely "appears to be" or "conveys the impression" of depicting a minor. The CPPA thus violates sound constitutional principles, reflected in this Court's

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[1] The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

precedents, that permit the wholesale prohibition of non-obscene images *only* to protect the actual children depicted. The Act, and the rationales offered to justify its broad scope, threaten the suppression of a substantial amount of otherwise-protected speech.

Given these concerns, and for the reasons set forth below, *amicus* urges the Court to affirm the decision of the court of appeals.

STATEMENT OF THE CASE

Congress enacted the Child Pornography Prevention Act ("CPPA" or the "Act") on September 30, 1996. The Act expanded the federal definition of "child pornography," criminalizing, for the first time ever, expressive material that "appears to be" or "conveys the impression" of minors engaged in sexually explicit conduct. The broader definition targets so-called "virtual child pornography," which, unlike traditional child pornography, includes sexually explicit images that were not created with, and do not depict, actual minors.

Specifically, the CPPA defines "child pornography" as:

> any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct[2]

[2] The Act defines "sexually explicit conduct" as "actual or simulated – (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2).

> where –
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2256(8) (emphasis added).

Several plaintiffs filed suit in the Northern District of California, asserting a facial constitutional challenge to the CPPA's "appears to be" and "conveys the impression" provisions. The district court granted the government's motion for summary judgment, determining that the Act was consistent with the First Amendment. *Free Speech Coalition v. Reno*, No. C 97-0281 VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997). The Ninth Circuit Court of Appeals reversed the decision of the district court, ruling that the Act unconstitutionally "makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct." *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1086 (9th Cir. 1999). Specifically, the court found that the phrases "appears to be" a minor and "conveys the impression" that the depiction portrays a minor, "are vague and overbroad, and thus do not meet the requirements of the First Amendment." This Court granted the government's Petition for a Writ of Certiorari on January 22, 2001.

SUMMARY OF ARGUMENT

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that sexually explicit depictions of actual children are unprotected speech under the First Amendment, even if the depictions fall short of obscenity. With the passage of the CPPA, federal law now purports to criminalize the possession, display, distribution, and receipt of visual depictions, not only of actual children, but of material that "appears to be" or "conveys the impression" of a minor engaging in sexually explicit conduct. This unprecedented expansion of the definition of proscribable child pornography runs counter to core First Amendment principles and this Court's delineation of the proper boundary of constitutionally protected speech.

Because it criminalizes non-obscene expression that does not involve real children, the CPPA effectuates an unconstitutional prohibition on protected speech. In order to uphold the Act, this Court would have to effectively create a new category of wholly unprotected speech, or conclude that the content-based ban at issue here survives strict scrutiny. The interests asserted by the government – including protecting the sensibilities of viewers, preventing the seduction of children, drying up the pornography market, and facilitating enforcement of the statute – are insufficient to justify a categorical exclusion of non-obscene sexual depictions involving young-looking adults, particularly given that the statute contains no exception for material that possesses literary, artistic, political, or social value. For similar reasons, the government's asserted justifications do not survive the strict scrutiny applicable to content-based speech restrictions. Nor does the Act's affirmative defense correct the CPPA's fundamental flaws, both because of the limited scope of the defense, and because it improperly shifts the burden of proof to the defendant to

demonstrate innocence. Finally, the Act is facially overbroad because it encroaches too deeply into areas of protected speech.

ARGUMENT

I. THE CPPA IS AN UNCONSTITUTIONAL PROHIBITION ON PROTECTED SPEECH.

A. The Material Criminalized By the Act Does Not Fall Into Any Recognized Category of Unprotected Speech.

This Court has permitted the complete prohibition of expression only "in a few limited areas." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). As the Court recently cautioned, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817-18 (2000) (internal quotation marks and citation omitted).

Because of this nation's core belief that society flourishes only when its citizens are free in their ability to think and express their thoughts – even when those thoughts and beliefs are unpopular and offensive – this Court has carefully limited the rationale justifying blanket bans on speech. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). The narrow categories that have been deemed unprotected are those in which the speech causes palpable, immediate injury by its very expression, *e.g.*, defamation, *see*

Beauharnais v. Illinois, 343 U.S. 250, 267 (1952), fighting words, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), incitement to imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), child pornography depicting actual minors, *see New York v. Ferber*, 458 U.S. 747, 764 (1982), and sexually explicit speech that lacks serious value, *see Miller v. California*, 413 U.S. 15, 24-25 (1973).

Prior to *New York v. Ferber*, 458 U.S. 747 (1982), the Court sanctioned the wholesale suppression of sexually explicit speech only where such expression satisfied the three-part test for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* test features several substantive protections adopted to ensure that the government criminalizes no more speech than constitutionally permitted, including a reliance on contemporary community standards, a requirement that proscribable depictions be defined, and an exception for works with serious literary, artistic, political, or social value. *Id.* at 24.

In *Ferber*, however, the Court carved out an additional category of unprotected expression – sexually explicit material that, although it may not satisfy *Miller*'s strictures, may be banned because it features young children. This Court's adoption of child pornography as a separate category of unprotected of speech is firmly, and appropriately, rooted in the recognition that the sexual abuse of actual children depicted represents such palpable, immediate harm to those children that the expression simply cannot be permitted: "When a definable class of material . . . bears so heavily and pervasively on the welfare of *children engaged in its production*," the Court explained, "it is permissible to consider these materials as without the protection of the First Amendment." *Ferber*, 458

U.S. at 764 (emphasis added).[3]

The Court in *Ferber* thus expressly justified the unprotected status of child pornography by reference to the identifiable harm suffered by the actual child performers. *Id.* at 758-59. And, because of the inherent abuse suffered by the depicted minors, the Court approved the removal of *Miller*'s requirement that the speech lack serious literary, artistic, scientific, and political value. According to the Court, this exception to *Miller*, and the associated encroachment on otherwise protected expression, survived constitutional scrutiny *only* because of the concrete harm inflicted on the actual minors featured:

> Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be 'patently offensive' in order to have required the sexual exploitation of a child for its production. . . It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.

Ferber, 458 U.S. at 761 (internal quotation marks and citation omitted). *See also id.* at 774-75 (O'Connor, J., concurring) ("[A] 12-year-old child photographed while masturbating

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[3] Of course, some materials may qualify both as obscenity and child pornography. To the extent that materials covered by the CPPA (featuring, for example, youthful-looking adults instead of minors) also constitute obscenity, *amicus* recognizes that these materials may be lawfully banned as obscenity (notwithstanding the constitutional infirmity of the CPPA).

surely suffers the same psychological harm whether the community labels the photograph 'edifying' or 'tasteless.' The audience's appreciation of the depiction is simply irrelevant to [the government's] asserted interest in protecting children from psychological, emotional, and mental harm.").

Because of the dangers of any categorical First Amendment exclusion, the Court in *Ferber* defined child pornography extremely narrowly, ensuring that only depictions of real minors in sexually explicit poses would be unprotected. In drawing this bright line, the Court made clear that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Id.* at 764-65. The Court reinforced this rule, clarifying that it is the abusive conduct suffered by the child depicted – and not the mere appearance of distasteful images – that supports the categorical exception to *Miller*: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.* at 763 (footnote omitted).

Subsequent decisions of the Court have never wavered from *Ferber*'s narrow definition of child pornography. The definition was left untouched by *Osborne v. Ohio*, 495 U.S. 103 (1990), which addressed only whether states could ban the possession (in addition to the creation or distribution, as in *Ferber*) of real child pornography.[4] Four years later, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court

[4] The state statute in *Osborne* covered only depictions of actual children. *Osborne*, 495 U.S. at 106.

confirmed *Ferber's* limits on child pornography, stating that "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." *Id.* at 72.[5]

B. This Court Should Decline to Create a New Category of Unprotected Speech.

Because the CPPA bans expression that falls outside the Court's narrow definition of child pornography, it can be upheld against constitutional challenge only if this Court creates what effectively is a new and dangerously broad category of unprotected speech, or if this Court concludes that the statute survives strict scrutiny. The government in this case asks the Court to reverse its trend over the last forty years of "narrow[ing] the scope of the traditional categorical exceptions," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), and instead urges it to conclude that the speech at issue falls wholly outside the scope of the First Amendment. In doing so, the government relies on a series of rationales that have never before been deemed sufficient to sustain a categorical ban on speech. As set out below, *amicus* urges this Court to decline the government's invitation. Although *amicus* heartily endorses the conclusion that real child pornography is repugnant and properly criminalized, the statute at issue here

[5] *X-Citement Video* addressed the scienter requirement in the federal child pornography statute, holding that defendants could be convicted only upon proof that the they knew of the minority of the children depicted. *Id.* at 78. The Court highlighted the First Amendment underpinnings of its decision, explaining that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *Id.* (citing *Ferber*, 458 U.S. at 765, and *Osborne*, 495 U.S. at 115). *X-Citement Video* thus reinforced the principle, articulated in *Ferber*, that nonobscene sexual expression can be banned only if it involves the abuse of actual minors.

does not criminalize that behavior, but instead sweeps in a wide variety of speech that, *inter alia*, has serious literary or artistic value, and the production of which does not involve – and therefore does not harm – any real minor.

1. The CPPA Criminalizes a Wide Scope of Constitutionally Protected Speech.

Through the CPPA, Congress dramatically expanded the federal definition of child pornography to cover images that do not involve actual children. By criminalizing material that merely "appears to be" or "conveys the impression" of being minors engaged in sexually explicit conduct, 18 U.S.C. § 2256(8)(B) & (D), Congress expressly targeted images that are not obscene and do not involve the use of actual children.

The scope of the Act's prohibition is stunning. Even prior to the 1996 amendments to the federal statute, child pornography laws nationwide covered a vast array of material. The federal law's prohibition of "lascivious exhibition of the genitals," for example, has been interpreted to include pictures of minors that contain absolutely no nudity. *See United States v. Knox*, 32 F.3d 733, 751 (3d Cir. 1994). Similarly, aggressive prosecution of state child pornography laws recently has targeted, for instance, a mother's photographs of her eight-year-old daughter bathing in a bathtub,[6] and a grandmother taking pictures of her undressed four- and six-year-old

[6] *See, e.g.*, Steve Marshall & Hilary Wasson, *Pictures of Daughter In Bath Submerge Mom in Hot Water*, U.S.A. Today, Feb. 28, 2000, at 5A. The arrested woman in that case ultimately agreed to enter into a counseling program and have her photographs destroyed, rather than go to trial and risk sixteen years of prison if convicted. *See, e.g.*, Bill Lohmann, *Now, What's Wrong With This Picture?* Richmond Times-Dispatch, Apr. 11, 2000, at D1.

granddaughters.[7]

Melding the Act's remarkably broad definition of "lascivious exhibition" with depictions of adults who "appear[] to be" younger than 18 could allow the prosecution of the producers, distributors or viewers of a vast amount of mainstream expression that merely suggests sexual conduct without actually depicting any nude or explicit images of real minors. And the fact that the Act contains no exception for artistic works could easily lead to the criminalization of art that suggests sexual conduct in which a minor is involved, even where no minor actually participated in any way in the production of the material in question.

These concerns are not merely abstract. During the initial release of the recent film version of Nabokov's classic novel *Lolita*, for example, American distributors refused to carry the film for fear of violating the recently enacted CPPA.[8] The Act thus has already had a real, demonstrable chilling effect on artistic work, notwithstanding the film maker's marked efforts to excise any potentially problematic scenes.[9] Thus, even short

[7] *See, e.g.*, Debra Galant, *Peeking Under the Bearskin Rug*, N.Y. Times, Feb. 27, 2000, at 14NJ1.

[8] *See, e.g.*, Celestine Bohlen, *A New "Lolita" Stalls in Europe; Hollywood Snubs Remake of the Tale of an Adolescent Siren*, N.Y. Times, Sept. 23, 1997, at E1.

[9] *See, e.g.*, Bohlen, *supra*, at E1. ("[T]here are very few sex scenes in 'Lolita,' even fewer after [the director] and a lawyer specializing in First Amendment cases spent five to six weeks making cuts to bring the film into conformity with the Child Pornography Prevention Act of 1996."); Richard Covington, *"Lolita" Makes the European Rounds Remake based on Nabokov novel opens in France but still has no U.S. distributor*, L.A. Times, Jan. 20, 1998, at F1 ("Although the director used body doubles for

of prosecution and conviction, informal censorship of the sort experienced by *Lolita* can have a devastating effect on the free flow of protected expression.[10]

Similarly, events surrounding the confiscation of the Academy Award-winning film *The Tin Drum* starkly illustrate the dangers of statutes as broadly worded as the CPPA.[11] In 1997, a local judge issued an *ex parte* ruling declaring the film to be in violation of Oklahoma's child pornography statute. *See Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1217 (10th Cir. 2001). Pursuant to that order, Oklahoma City officials confiscated every available videotape copy of the film, in some cases visiting private homes based on information provided by video stores. *Id.* at 1219.

The Oklahoma statute under which the film was initially deemed child pornography prohibited, in language similar to the CPPA, "material wherein the minor is engaged in *or portrayed, depicted, or represented as engaging in* sexual intercourse . . . or other sexual activity." Okla. St. tit. 21 § 1021.2 (Supp. 1997) (emphasis added). In reviewing the

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sex sequences, virtually all the explicit scenes were cut to conform with the United States' Child Pornography Act of 1996.").

[10] For this reason, the supposed protections offered by the courts of appeals' various limiting constructions of the Act ring hollow. *See, e.g., United States v. Fox*, 248 F.3d 394, 405 (5th Cir. 2001) (assuming that the "troubling possibility of the statute's application to artistic expression" such as "stills from a film version of Nabokov's *Lolita*" would disappear simply by virtue of the court's narrow reading of the CPPA).

[11] The German language film also won the Palme D'or Award at the Cannes International Film Festival in 1979. *See Oklahoma v. Blockbuster Videos, Inc.*, No. Civ-97-1281-T, 1998 WL 1108158, at *2 (W.D. Okla. Oct. 20, 1998).

child pornography question, a federal district judge described the films:

> It is not disputed that [the allegedly objectionable] scenes do not contain graphic sexual activity and that the actors did not engage in actual sexual activity or contact with the genitals or genital area during any of these scenes; it is also not disputed that neither total nor frontal nudity nor the display of the genital area appears in any of these scenes.

See Oklahoma v. Blockbuster Videos, Inc., No. Civ-97-1281-T, 1998 WL 1108158, at *3 (W.D. Okla. Oct. 20, 1998). Nonetheless, the judge determined that the basic provisions of the statute applied, explaining,

> The absence of such graphic or explicit activity does not, however, necessarily mean the statute does not apply because it also prohibits material in which minors are "portrayed, depicted, or represented as engaging in" sexual conduct. Notwithstanding the absence of graphic sexual portrayals and the use of artistic film techniques, it cannot be disputed that each of the scenes can be interpreted by a viewer as suggesting some type of sexual conduct.

Id. Thus, pursuant to language akin to that of the CPPA, a federal judge labeled as prohibited child pornography an award-winning film lacking any graphic sexual activity or nudity. The film was ultimately protected from prosecution, but *only* because the Oklahoma statute – unlike the CPPA – contained an exception for "bona fide objects of art or artistic pursuits." *See id.* at *6.

2. The Government's Asserted Interests Do Not Justify Creating a New Category of Unprotected Speech.

a. Concerns with the Effect on Listeners Is a Flatly Invalid Reason to Suppress Speech.

By extending the definition of child pornography to images that do not feature real children, the CPPA targets not the harm inherent in the creation of this material, as required by *Ferber* and the other categorical exclusion cases, but rather the presumed ill-effects on listeners – in this case, pedophiles and, by extension, the children they may harm. The legislative history is clear that this was a motivating factor underlying this legislation. Indeed, Congress expressly found that the ban was justified because "a major part of the threat to children posed by child pornography is its effects on the viewers of such material." *See* S. Rep. No. 104-358, at 17 (1996). This is a plainly invalid justification for the suppression of speech. As the court of appeals recognized, "[b]ecause the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, . . . censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment." *Free Speech Coalition*, 198 F.3d at 1094. *See also, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 Harv. J. on Legis. 439, 460 (1997) ("Virtual child pornography, which is not obscene, is nothing more than an imaginative idea. However repulsive, however disgusting to majoritarian beliefs, ideas constitute protected speech."). As the court of appeals explained,

> [A]ny victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions. This is so because to hold otherwise enables the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation.

Free Speech Coalition, 198 F.3d at 1093. *See also, e.g.*, *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985) (striking down ordinance prohibiting "degrading" adult pornography, and holding that, to the extent pornography perpetuates sexual oppression, this "simply demonstrates the power of pornography as speech"), *aff'd*, 475 U.S. 1001 (1986).

The government concedes, as it must, that "the regulation of speech because of its potential to incite unlawful conduct ordinarily does raise serious First Amendment concerns." Pet. Br. at 37 (citing *Brandenburg v. Ohio*, 395 U.S. at 447). Accordingly, as even the government recognizes, Congress's asserted interest in banning material simply because it "can desensitize the viewer to the pathology of sexual abuse," 18 U.S.C. § 2251 note (Supp. V 1999) (Finding 4), presents a quintessentially impermissible justification for speech regulation. *See, e.g.*, *Playboy*, 529 U.S. at 13 ("Where the designed benefit of a content-based restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails.").

b. The Government's Interest in Preventing the Seduction of Children Is Insufficient.

Congress's assessment that "child pornography is often used as part of a method of seducing other children into sexual activity," 18 U.S.C. § 2251 note (Supp. V 1999) (Finding 3), is also insufficient to justify placing the speech criminalized by the CPPA wholly outside the purview of the First Amendment. The fact that otherwise protected speech could encourage or promote unlawful activity has never been deemed sufficient to ban the speech. *See, e.g.*, *Brandenburg*, 395 U.S. at 447 (even speech that *expressly advocates* lawless activity cannot be the basis for criminal liability, unless the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

This case highlights the wisdom of that rule. "Many innocent things can entice children into immoral or offensive behavior." *Free Speech Coalition*, 198 F.3d at 1094 n.7. One can easily imagine children being lured by the offer of a comic book, a video game, or a cartoon. Under the government's rationale, a finding that such material was being used to entice children would be sufficient to justify a blanket ban on the material – a result plainly antithetical to both the First Amendment and common sense.

This does not mean, of course, that the government is powerless to do anything about the use of sexually explicit material to lure children. The state has at its disposal a variety of laws to combat the evils of child seduction, including prohibitions on showing minors certain sexually explicit material. *See Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding "harmful to minors" statute). And, of course, the state can vigorously enforce restrictions on adults actually

engaging in sexual activities with minors. *See, e.g.*, N.Y. Penal Law § 130.65(3) (McKinney 2001) (prohibiting sexual abuse of minors); 18 U.S.C. § 2243 (same). *Amicus* does not contend that these laws alone will wholly eradicate the targeted behavior. That, however, is inevitable – no set of criminal laws completely deters unlawful activity. But it has always been clear that, to the extent vigorous enforcement of valid criminal laws fails to eradicate completely their targeted crimes, the government cannot simply disregard the First Amendment in an effort to correct the problem. *See Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.") (internal quotation marks and citation omitted).

The government offers a narrowing construction of the statute to address this problem, proposing to limit the CPPA's coverage of virtual child pornography to images that are "virtually indistinguishable" from photographs of real children. Pet. Br. at 24-27 (quoting 18 U.S.C. § 2251 note (Supp. V 1999) (Finding 8)). *See also United States v. Fox*, 248 F.3d 394, 405 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912, 921-22 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61, 72 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d 645, 651 (11th Cir. 1999).[12] As an initial matter, this limiting principle

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[12] The government also looks to *Osborne* to support its claimed interest in using the CPPA to prevent the seduction of children. *See* Pet. Br. at 37 (quoting *Osborne*, 495 U.S. at 111). But *Osborne*, as *Ferber* before it, addressed permissible limitations only on the use of actual children as subjects of pornographic materials. *Osborne*, 495 U.S. at 106-07. *Osborne* thus discussed the state's interests in the context of materials that inherently harm children by their very creation.

is nowhere found in the CPPA itself, and there is no assurance that the Act's application will be so limited. But the more fundamental point is that the government's reliance on the seduction rationale extends well beyond the terms of this statute. If accepted, it could lead to a host of speech regulations premised only on the purported link between the regulated material and unlawful conduct involving children. *See, e.g.*, *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001) (enjoining ordinance seeking to limit minors' access to violent video games); Clay Calvert, *The "Enticing Images" Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 Fordham Intel. Prop. Med. & Ent. L.J. 595, 608-11 (2000) (discussing efforts to restrict cartoons advertising cigarettes and violent images on television, movies, and in video games). The Court cannot open the door to such dramatic incursions on protected expression.

c. The "Dry Up the Market" Theory Does Not Justify the Ban on Protected Speech.

Several purported justifications for the CPPA, the government argues, are valid because they do not depend on viewers' reactions to the proscribed materials. These asserted rationales, however, are wholly unavailing. First, relying heavily on Congress's determination that "the production and

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In *Osborne*, this Court marginally extended the bounds of permissible prohibitions on *actual* child pornography, from bans on production and distribution, *see Ferber*, 458 U.S. at 751, to bans on possession. *Osborne*, 495 U.S. at 108. *Osborne*'s reliance on the seduction rationale to help justify the ban on possession is therefore unremarkable. By contrast, the CPPA's leap from prohibiting *actual* child pornography to criminalizing *imaginary* child pornography is one of an entirely different character, and cannot be supported by a rationale that relies solely on regulating the seductive effects of otherwise protected expression.

distribution of computer-generated child pornography helps to sustain the market for the production of visual depictions that involve real children," Pet. Br. at 6, the government seeks to justify the Act's new categorization of unprotected speech by arguing that it is necessary to dry up the child pornography market. *See id.* at 6, 28, 35,45-46. But although the Court has recognized that this rationale has some applicability in the child pornography context, it has only been applied to cover material that is, in itself, child pornography as defined in *Ferber*. *See Ferber*, 458 U.S. at 760-61 (justifying prohibition on advertising and selling of child pornography featuring real minors); *Osborne*, 495 U.S. at 109-10 ("Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain.").[13]

Confining the "dry up the market" theory to material *already unprotected* by the First Amendment is critical to ensuring that this rationale not swallow broader constitutional guarantees. Were the rationale applicable to any protected speech that could reasonably be viewed as stimulating pedophiles' desires and fueling the child pornography trade, its reach would be virtually boundless.

For example, "[p]edophiles often find stimulation from the very same pictures that non-pedophiles consider innocuous,

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[13] In explaining the "dry up the market" theory in the context of child pornography, the Court recently highlighted the fact that "the speech at issue is considered of minimal value." *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1762 n.13 (2001) (citing *Osborne*, 495 U.S. at 108; *Ferber*, 458 U.S. at 762). This suggests that the "dry up the market" rationale – as with the other justifications introduced in *Osborne* – applies only to valueless speech, which, absent the three-pronged protections of *Miller*, must be limited to depictions of real children.

that we extol and value." Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 259 (2001) (footnote omitted); Dennis Howitt, *Pornography and the pedophile: Is it criminogenic?*, 68 Brit. J. of Med. Psych. 15, 23 (1995) (reporting research indicating that, for pedophiles, "arousing images were often found in licit newspapers and magazines, television programmes, and videos, not usually involving nudity"). "In fact, certain pedophiles may prefer 'innocent' pictures." Adler, 101 Colum. L. Rev. at 259.[14] Thus, if Congress may ban computer-generated images simply because those images help sustain the child pornography market, so, too, can the government criminalize department store catalogues, medical textbooks, and the Disney channel. *See id.* at 259-60 & n.281 (citing materials preferred by pedophiles). The First Amendment surely forbids this result.

d. The Interest in Facilitating the Enforcement of Valid Child Pornography Laws Does Not Justify the CPPA's Invalid Reach.

The government also suggests that excluding the material at issue here from the First Amendment's reach is justified because it aids in the enforcement of prohibitions on unprotected speech. According to this theory, because computers can be used to "alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to . . . determine if the offending material was produced using children," 18 U.S.C.

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[14] "According to some theorists, the stimulation of a picture may be inversely proportional to its overtly sexualized nature: It may be the very innocence – the sexual naïveté – of the child subject that is sexually stimulating." Adler, 101 Colum. L. Rev. at 259-60 & n.282 (citing James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* 54-55 (1998)).

§ 2251 note (Supp. V 1999) (Finding 6(A)), law enforcement must be free to target computer-generated images as well as real depictions of children. *See* Pet. Br. at 27 ("Congress was concerned that the government would be unable to meet its burden of proving that a pornographic image is of a real child."). As an initial matter, however, there is no concrete evidence that current technology is thwarting the government's prosecutions of child pornography. Congress's findings on this issue speak only to the *potential* for difficult enforcement. *See* S. Rep. No. 104-358, at 17 (referring to *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995), in which the accused raised the defense, ultimately rejected, that because of computer technology it was difficult to determine whether actual children were depicted). In fact, the government has not cited *any* case in which a defendant *successfully* avoided child pornography prosecution by relying on the purported "built-in reasonable doubt argument." *See* Pet. Br. at 27-28 (quoting S. Rep. No. 104-358, at 16).

In any event, aiding law enforcement is not a valid justification for deeming an entire category of speech outside the bounds of the First Amendment. One can easily imagine a wide range of activity – including warrantless wiretapping, physical coercion of criminal suspects, and unlimited warrantless review of the mail – that would aid the government in detecting and prosecuting criminal activity. But the mere facilitation of law enforcement plainly does not justify abandonment of the constitutional safeguards that prohibit such activity. *Cf. Kyllo v. United States*, 121 S. Ct. 2038, 2046 (2001) (holding that use of thermal imager triggers Fourth Amendment scrutiny, despite obvious law enforcement benefits). Congress cannot escape its First Amendment obligations and criminalize protected speech simply by asserting a law enforcement need for additional statutory

coverage. *See, e.g.*, *Stanley*, 394 U.S. at 568 (speech restrictions cannot "be justified by the need to ease the administration of otherwise valid criminal laws") (citing *Smith v. California*, 361 U.S. 147 (1959)).

II. THE CPPA CANNOT SURVIVE STRICT SCRUTINY

As discussed above, sexually explicit, non-obscene expression that does not contain images of actual children falls outside, and should remain outside, the narrow categories of unprotected speech currently recognized by the Court.[15] Accordingly, because it is undoubtedly a content-based prohibition on expression,[16] the CPPA is presumptively unconstitutional and "can stand only if it satisfies strict scrutiny." *Playboy*, 529 U.S. at 813; *see also Reno v. ACLU*, 521 U.S. 844, 868 (1997); *R.A.V.*, 505 U.S. at 382. The Act's

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[15] It is well-settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to First Amendment protection. *See, e.g.*, *Playboy*, 529 U.S. at 826 ("We cannot be influenced . . . by the perception that the regulation in question [of 'sexually oriented programming'] is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."); *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (citation omitted).

[16] The government wisely has abandoned its claim, rejected by every court of appeals to consider this issue, that the Act is content-neutral. *See United States v. Fox*, 248 F.3d 394, 400 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912, 918 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61, 69 (1st Cir. 1999); *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1091 (9th Cir. 1999); *United States v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999).

provisions criminalizing material that "appears to be" and "conveys the impression" of being actual minors, and the government's various justifications in support of those provisions, cannot survive such scrutiny.

A. The Government's Asserted Justifications Are Insufficient.

As described above, *supra* Part I(B)(2), the government asserts four justifications in support of the Act. Two are aimed at the viewers' reactions to the images at issue, and are therefore plainly invalid. The remaining two justifications are similarly insufficient, for the reasons discussed above. For the same reasons the four asserted rationales do not provide a basis for creating a new category of unprotected speech, they also fall well short of the government's heavy burden required to sustain the CPPA's content-based, wholesale prohibition on otherwise protected speech. Just as they do not support the creation of a new category of unprotected speech, the government's justifications for the Act are not narrowly tailored to serve any compelling interest.

B. The Act's Affirmative Defense Does Not Cure Its Constitutional Flaws.

The CPPA's fundamental flaws are not cured by the Act's affirmative defense, *see* Pet. Br. at 8, 31, 33-34 (relying on affirmative defense in attempt to demonstrate constitutionality of statute), which requires the defendant to prove that actual adults were used in the depiction at issue. *See* 18 U.S.C. § 2252A(c). First, although the defense is available for most violations of the statute, it cannot be invoked by those accused of *possessing* child pornography. *Id.* Accordingly, even if an alleged possessor of child pornography *knows* that the image

does not depict an actual minor, that person cannot raise the Act's affirmative defense and still may face liability if she has knowledge that the picture "appears to be" or "conveys the impression" that it features a minor.

In addition, as with the Act's substantive definition of child pornography, the defense contains the problematic and open-ended "conveys the impression" phrase, requiring the defendant to prove that she did not "advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." *Id.* The defense is further limited by the fact that it does not protect fictional, computer-generated depictions that feature neither actual adults nor actual children.[17]

More importantly, although the CPPA's affirmative defense attempts to constrain the Act's expansive reach, the affirmative defense unconstitutionally places the burden on the defendant, not the government, to prove that the material in question does not depict an actual minor and was not promoted in such a way to convey the impression that it features actual children. This Court has made clear that the government may not recast a basic element of a crime as an affirmative defense or other presumption in order to relieve the state of its obligation to prove that critical fact beyond a reasonable doubt. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (holding that jury instruction regarding intent improperly

[17] Even in upholding the Act, the Fifth Circuit explained the virtual uselessness of the affirmative defense. *Fox*, 248 F.3d at 405 n.45 ("In candor, we must nevertheless recognize that, as this is an affirmative defense which places the burden of proving the models' majority on defendants who are virtually certain not to be able to track down producers and actors to adduce evidence of age, the defense is likely illusory.").

created presumption that effectively shifted burden away from government to prove every element of crime); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (noting that "there are obviously constitutional limits beyond which the States may not go" to reallocate burdens of proof by labeling "at least some elements" of crimes as affirmative defenses); *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) (holding that government may not shift burden of proof to the defendant by using a presumption to establish an essential ingredient of offense); *In re Winship*, 397 U.S. 358, 364 (1970) (due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime"). With the CPPA, the government has attempted impermissibly to shift the burden of proof to defendants,[18] by recasting the basic, constitutionally required element of knowledge that the image is a minor, *see X-Citement Video*, 513 U.S. at 469, 472 (indicating constitutional requirement that the burden rest with the government, not the defendant, to prove the minority of the person depicted), as an affirmative defense.

III. THE CPPA IS UNCONSTITUTIONALLY OVERBROAD.

The CPPA is impermissibly overbroad because it bans a substantial amount of constitutionally protected speech. The overbreadth doctrine requires the facial invalidation of statutes that prohibit some unprotected speech but, by their scope, also reach a substantial amount of constitutionally protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). "In such cases, it has been the judgment of this Court that the possible

[18] The government concedes as much in its brief. Pet. Br. at 27 ("Congress was concerned that the government would be unable to meet its burden of proving that a pornographic image is of a real child.").

harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Id.* As discussed above, the government has no compelling interest in criminalizing non-obscene images that do not depict actual children. As a result, even if the statute covers some unprotected speech, the "appears to be" and "conveys the impression" language of the Act are impermissibly overbroad.

The government asserts that this statute is not overbroad, relying on this Court's rejection of an overbreadth claim in *Ferber*. *See* Pet. Br. at 51-53. The reach of the statute at issue in *Ferber*, however, was far less extensive than the that of the CPPA. "While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the statute." *Ferber*, 458 U.S. at 772. Conversely, because the CPPA's coverage is significantly broader than the law in *Ferber*, its chilling effect is substantially greater. In particular, the CPPA criminalizes two categories of protected expression not covered by, or specifically excluded from, *Ferber*'s definition of child pornography: sexually explicit depictions of youthful-looking adults, and computer-generated images that do not involve any

real children.[19] *See id.* at 762-63.[20]

The resulting impermissible sweep of the statute is substantial. By criminalizing works that do not even involve real minors, without regard to the materials' literary, artistic, scientific, or political value,[21] the Act threatens to silence a great deal of fully protected speech. *See supra* Part I(B)(1). *Amicus* shares the government's desire to deter and punish child molesters and those who trade in actual child pornography. But while those interests are undoubtedly substantial, they do not justify the significant overreaching of the CPPA. Given examples like that of *The Tin Drum*, *amicus* finds no comfort in the government's unenforceable

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[19] Respondents have not challenged the provisions of the CPPA criminalizing so-called "morphed" images of actual children, which have been "created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(C).

[20] Similarly, the Ohio statute in *Osborne* contained many exemptions – absent from the CPPA – that supported the Court's rejection of an overbreadth claim in that case. *Osborne*, 495 U.S. at 112-13 & n.9 (statute exempting, among other things, material with "a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose" or possessed or disseminated "by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance").

[21] Although the government acknowledges that the Act raises "serious questions" in cases where "depictions of child pornography are necessary 'in order to produce educational, medical, or artistic works,'" Pet. Br. at 53 n.9 (quoting *Ferber*, 458 U.S. at 773), it rejects the notion that "the First Amendment requires some type of serious value defense." *Id.* *Amicus* strongly disagrees, and believes that, at the very least, this defense must be available to works that do not involve actual minors.

reassurances[22] that the Act will not be exploited to its textual limits.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals holding the challenged provisions of the CPPA unconstitutional should be affirmed.

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July 2, 2001

[22] The government tries to minimize the threat of unduly expansive enforcement of the CPPA, asserting that "the Act does not apply to visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted." Pet. Br. at 52-53. This limitation, however, is absent from the statute itself, and there simply is no reason to think that prosecutors across the country will adhere to it.